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No. 94-

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROY B. TAYLOR SALES, INC.,

Petitioner,

v.

HOLLYMATIC CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

1 November 1994

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QUESTIONS PRESENTED

1. Whether the rule of *per se* illegality under the Sherman Act, § 1, 15 U.S.C. § 1, and the Clayton Act, § 3, 15 U.S.C. § 14, applies to a tying arrangement imposed upon a dealer who is terminated for refusing to purchase the tied product at supracompetitive prices?

2. Whether the holding of the court of appeals that the rule of *per se* illegality applies only to tyings imposed upon the ultimate consumers of the tied product is contrary to *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and other decisions of this Court?

3. Whether a dealer subjected to a tying arrangement must show a substantial competitive effect upon the downstream consumer market in order to obtain relief under the antitrust laws?

LIST OF PARTIES

The parties to this case are:

Roy B. Taylor Sales, Inc.,

and

Hollymatic Corporation.

Pursuant to Rule 29.1, Petitioner, Roy B. Taylor Sales, Inc. is not a parent or subsidiary of any other corporation but is a closely held corporation in which the sole shareholders are Roy B. Taylor, Nina Taylor, and Ronnie Taylor.

DONALD M. HUNT

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, ROY B. TAYLOR SALES, INC., plaintiff-appellee below, respectfully submits this petition for writ of certiorari to review the reversal of its judgment against respondent, HOLLYMATIC CORPORATION, defendant-appellant below.

For brevity, reference to the parties is by a "shorthand" designation of their corporate names as "Taylor" and "Hollymatic."

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported as shown, *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379 (5th Cir. 1994), and is reproduced in APPENDIX 1. The judgment of the district court is unreported but is reproduced in APPENDIX 2.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on 3 August 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Sherman Antitrust Act, § 1, as pertinent in this case, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal. * * *

15 U.S.C. § 1.

The Clayton Antitrust Act, § 3, as pertinent in this case, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a sale * * * of goods * * * on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor * * * of the * * * seller, where the effect of such * * * sale * * * or such condition * * * may be to substantially lessen competition * * *.

15 U.S.C. § 14.

REASONS FOR GRANTING THE WRIT

This case presents issues of the fundamental protection afforded under the antitrust laws to dealers who are victims of illegal tying arrangements for refusing to purchase the tied product at supracompetitive prices. The United States Court of Appeals for the Fifth Circuit has decided federal antitrust questions in a way which conflicts with this Court's application of the rule of *per se* illegality in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and *Eastman Kodak Co. v. Technical Services, Inc.*, 504 U.S. ___, 119 L.Ed. 2d 265 (1992).

The court of appeals denied the application of the *per se* rule of illegality to a dealer, even in the face of evidence of all elements of a *per se* claim, by use of an economic theory which assumes there can be no anticompetitive injury if ultimate consumers can purchase the tied product from a dealer not subject to the tie. The theory makes no sense because it fails to consider the anticompetitive injuries which result when a tied dealer successfully passes on to ultimate consumers the supracompetitive prices and other dealers raise their prices to just below the tied prices.

Under the guise of holding the evidence to be insufficient to support an anticompetitive injury, the court of appeals has emasculated the rule of *per se* illegality as it applies to dealers and replaced it with the Rule of Reason. As observed in *Jefferson Parish*, 466 U.S. at 9, it is "far too late" to question the continued viability of the rule of *per se* illegality. Yet the court of appeals relegated dealers to the Rule of Reason and created a rule of ***per se legality*** if one ultimate consumer can purchase the tied product. Therefore, this Court should grant the writ to assure the correct and uniform application of the antitrust laws.

STATEMENT OF THE CASE

Proceedings and Results

This is an antitrust case. Taylor sued Hollymatic, *inter alia*, on *per se* tying claims pursuant to the Sherman Act, § 1, 15 U.S.C. § 1, and the Clayton Act, § 3, 15 U.S.C. § 14. Taylor invoked jurisdiction of the district court based upon 28 U.S.C. §§ 1331 (federal question), 1332 (diversity), and 1337 (restraint of trade). Hollymatic answered and denied any tying.

The case was tried to a jury, which returned a verdict based on special interrogatories for Taylor on both *per se* tying claims, finding Taylor's damages to be $296,662.60 (*see* pertinent parts of the charge in APPENDIX 3). The district court entered judgment for Taylor on the verdict, trebled as a matter of law.

Hollymatic appealed to the court of appeals, which reversed, holding the evidence to be insufficient, based on an economic theory exempting from the *per se* rule those ties that victimize only dealers if ultimate consumers can obtain the tied product from other sellers not subject to the tie. Taylor now petitions for certiorari to seek protection of the antitrust laws for dealers who can prove the elements of a *per se* tying claim.

Statement of Facts

The Parties. Taylor, a closely held family corporation, sells and services food handling equipment and supplies in the Lubbock, Texas, trade area. Hollymatic, headquartered in Countryside, Illinois, manufactures and sells food processing equipment and supplies in the United States, Mexico and Canada. Hollymatic operates via a nationwide system of dealers which are now 86 in number.

Taylor became a dealer for Hollymatic in 1970 by executing a dealer contract. By that contract, Taylor promised that it would "not stock or sell * * * any other line competitive to the Hollymatic line of equipment, parts, accessories, supplies, or paper." Hollymatic replaced the 1970 contract with a new version in 1979. The 1979 contract continued Taylor as a Hollymatic dealer for 88 counties in the Western-third of Texas, 6 counties in the Eastern-edge of New Mexico and all of the Oklahoma panhandle.

The Tying. While the 1979 contract no longer contains the prohibition against selling competitive products, a dealer under the 1979 contract nevertheless promised to use his "best efforts regularly and continuously to promote, sell and service Hollymatic products within Dealer's area" up to the "full potential." This "best efforts" policy was a continuation—albeit unwritten—of the "full line" coverage requirement and the prohibition against selling products which competed with Hollymatic. Hollymatic believed that a dealer could not use "best efforts" and be a "full line" dealer unless the dealer sold Hollymatic Patty Paper, because being a "full line dealer means [that] if you are going to sell our patty machines you have to sell our patty paper."

Taylor successfully served as a Hollymatic dealer. The success of a Hollymatic dealer was built in large measure on the sale of the Super Patty Machine. This machine, developed in the 1940's and continuously improved since, produces hamburger patties. The Super Patty Machine was ideal for restaurants, supermarkets and fast food vendors. The Super Patty Machine occupies a place of preeminence in the market, since no better engineered machine has ever been built. The Super Patty Machine has

few competitors and no peers and is the industry leader in the United States, capturing over 95% of Taylor's market for machines of that size. Dealers also sold replacement parts and patty papers (a wax paper necessary in the separation of hamburger meat). Over the years, a dealer's sales would be approximately one-third each for machines, parts (including service), and patty paper. Patty paper represented 37-38% of Hollymatic's sales.

The Market Power. Taylor continued as a Hollymatic dealer during the 1980's, but the sale of patty paper changed significantly. In the mid-1980's, the sale of patty paper became competitive when new manufacturers entered the marketplace with reduced pricing. Hollymatic, in contrast, continued to increase the price of patty paper to dealers. Although the price of patty paper dropped in the marketplace, Hollymatic and its paper supplier, Bomarko, each continued to earn double-digit profit margins on patty paper. To encourage Hollymatic dealers to order Hollymatic Patty Paper, Hollymatic offered rebates to dealers. These rebates aided dealers in meeting competition with selective customers. Although Hollymatic granted rebates on approximately 4% of the paper it sold, the other 96% of the paper products were sold by dealers without rebates.

Hollymatic's patty paper sales continued to be "substantial," although it continued to increase prices and offered rebates on only 4% of its sales to dealers. Hollymatic explained that dealers continued to buy at the higher prices because of the value of the Hollymatic line. Customers continued to buy from Hollymatic dealers at the higher prices because of Hollymatic's "overall program." Customers dealt with the dealers and paid the higher prices because of the "common tie" between the dealer, ma-

chines, and service. Indeed, Hollymatic admitted that its dealers succeeded in maintaining Hollymatic's market leadership in patty paper "in a majority of the cases."

The Initial Coercion. Taylor, however, felt coerced as long as it was buying Hollymatic paper, but it continued to sell Hollymatic Patty Paper, even with increased competition. Taylor earned a commendation letter from Hollymatic for increasing its "patty paper business in 1987." As the competition increased, Taylor began to look for a less expensive supply of paper products. While Taylor continued to purchase patty paper from Hollymatic until late 1988, Taylor ceased further direct purchases from Hollymatic after that time. Instead, Taylor purchased patty paper of comparable quality, called Shur Quality, but at a more competitive price.

The drop in Taylor's ordering of Hollymatic Patty Paper did not go unnoticed at Hollymatic. In early 1990, Hollymatic made inquiries to Taylor about patty paper. Not wanting to explain that it was buying Shur Quality patty paper, Taylor responded that it was purchasing Hollymatic Patty Paper through nearby dealers. Hollymatic persisted, requesting that Taylor furnish the names of the Hollymatic dealers and the amount of the Hollymatic Patty Paper which Taylor had purchased. Taylor furnished information showing its purchases from other Hollymatic dealers in 1989 and early 1990, but because the amount of paper shown was small, Hollymatic was not satisfied.

The Final Coercion. In early May, 1990, Hollymatic confronted Taylor's president, Ronnie Taylor. Ronnie Taylor admitted that he had ceased buying patty paper from Hollymatic in late 1988, except for the patty paper he

purchased in 1989-90 from other Hollymatic dealers. Shortly after that confrontation, by at least 15 May 1990, Hollymatic's paper products manager declined to meet Taylor's request for competitive pricing with Shur Quality and recommended that Taylor be terminated as a Hollymatic dealer.

In early June, 1990, Hollymatic terminated Taylor as a dealer, effective in 60 days. Taylor responded by offering to "buy only Hollymatic in the future" if Taylor could only keep the Hollymatic line. Hollymatic replied by a "draft" proposal for "probation instead of termination." Taylor replied immediately that while it would meet the terms for "probation," it was in no economic position to order 100 cases of Hollymatic Patty Paper per month as the "draft" proposed. After all, Taylor had only averaged that rate per month with the lower priced patty paper. Hollymatic's executive vice-president called Taylor and refused the offer saying, "We could not have a Hollymatic dealer not selling Hollymatic paper."

Little doubt existed as to the reason for termination. Hollymatic's unwritten policy was that a dealer could not sell competing patty paper. In the case of patty paper, a line would be drawn in the sand: "If they cross that, there was going to be dire consequences." In fact, after Hollymatic discovered that Taylor was selling a competing patty paper, Hollymatic reached the decision, at the highest levels, to make an example of Taylor. Hollymatic targeted Taylor "to show that if other dealers did not get in line, similar bad things would happen to them." Therefore, Hollymatic terminated Taylor as a dealer for refusing to purchase Hollymatic Patty Paper at supracompetitive prices.

ARGUMENT

The *per se* rule of illegality applies to a dealer who produces evidence of the tying elements; thus, the court of appeals erred in reversing for insufficient evidence by reviewing the evidence on an economic theory that effectively denies the *per se* rule to a dealer.

The petition for writ of certiorari should be granted and the judgment of the court of appeals reversed because that court has employed a flawed economic theory that emasculates the *per se* condemnation of illegal tying as it applies to a dealer. The court of appeals has exempted from the *per se* rule those ties that victimize only dealers if ultimate consumers can obtain the tied product from other sellers not subject to the tie. In so doing, the court of appeals has decided an important federal question in a way that conflicts with applicable decisions of this Court.

A. The per se *rule applies to an illegal tie against a dealer who establishes the tying elements.*

Demonstrating the flawed economic theory used by the court of appeals begins with the basics of tying. A tie is an arrangement by which a seller conditions the sale of one product (the "tying product") on the purchase of a second product (the "tied product") or on the purchaser's agreement not to purchase the tied product from any other seller. *Eastman Kodak*, 119 L.Ed.2d at 280; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). The essential characteristic of an invalid tying arrangement lies in the "seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

Eastman Kodak, 119 L.Ed.2d at 282, n.9 (quoting *Jefferson Parish*, 466 U.S. at 12).

Under the precedents of this Court, "certain tying arrangements" become unreasonable *per se* when four elements are satisfied:

(1) the seller conditions sale of its tying product on the buyer's purchase of the tied product;

(2) the tying and tied products are separate and distinct products;

(3) the seller possesses sufficient economic or market power in the market for the tying product to appreciably restrain competition in the tied product; and

(4) a not insubstantial amount of commerce in the tied product is foreclosed by the tying.

Jefferson Parish, 466 U.S. at 9, 12-18.

Expressed in more capsulized form, tying arrangements violate the Sherman Act and the Clayton Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak*, 119 L.Ed. 2d at 280 (quoting *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969)). This *per se* rule of illegality applies where a seller possesses sufficient market power in the tying product to "force" a tie and make probable anticompetitive consequences in the tied market, thereby eliminating the need for burdensome and costly inquiry into actual market conditions in the tied market. *Jefferson Parish*, 466 U.S. at 9-10. Therefore, *per se* condemnation is triggered and

becomes "appropriate if the existence of forcing is probable." *Id.* at 15.

Taylor produced sufficient evidence to satisfy the district court and the jury that the four elements had been satisfied (APP. 3). The court of appeals, however, emasculated the *per se* rule by making the rule subject to broad exceptions. *Taylor Sales*, 28 F.3d at 1383; APP. 1:9. The court of appeals exempts from the *per se* rule "ties that constrain only dealers" on the ground that these ties present "relative little danger to competition" if ultimate consumers can obtain the tied product from other sellers not subject to the tie. *Id.* The court did so by applying an economic theory which assumes that if ultimate consumers can obtain the tied product from other sellers not subject to the tie, there can be no anticompetitive injury and hence no *per se* condemnation. This holding creates a presumption of *per se legality*, the net effect of which is to deny the protection of the antitrust laws to local dealers. Thus, in order for a dealer to receive *per se* protection, the dealer must prove no ultimate consumer can purchase the tied product from another seller not subject to the tie.

The court of appeals never examined the evidence of tying or questioned the quantity or quality of the evidence supporting the elements. The court instead assumed a tying arrangement existed, declared the *per se* rule inapplicable and held the evidence to be insufficient to raise a fact issue on "either a threat or injury to competition" as necessary for an antitrust violation. *Taylor Sales*, 28 F.3d at 1381; APP. 1:2. The court, however, employed a flawed economic theory in analyzing the evidentiary basis that triggers the application of *per se* condemnation: evidence of market power which makes "the existence of forcing * * * probable." *Jefferson Parish*, 466 U.S. at 15.

The court of appeals ignored the economic realities that (1) a dealer forced to pay supracompetitive prices creates a competitive injury and (2) supracompetitive prices passed on to consumers produces a competitive injury. This Court should reject the attempt to employ flawed economic theory in conflict with the realities of the market place, just as it did in *Eastman Kodak*, 119 L.Ed.2d at 282-87. Rejection of an economic theory not supported in the evidence takes on added meaning when the evidence present in the record is examined. Therefore, the end result should be based on upon the record and not upon economic theory.

B. Evidence of the probability of anticompetitive effect triggers per se *condemnation.*

The flaw in the economic theory applied by the court of appeals becomes more apparent when juxtaposed with the threshold trigger of the *per se* rule. While Taylor produced evidence of the elements of tying claims sufficient to satisfy the district court and the jury, the court of appeals never examined that evidence to see if it met that threshold. *Taylor Sales*, 28 F.3d at 1382; APP. 1:5.

The court of appeals ignored this Court's command from *Jefferson Parish* on *per se* condemnation and instead relied heavily on the concurring opinion of Justice O'Connor and its attempt to eliminate the *per se* rule in favor of the Rule of Reason. In the holding of *Jefferson Parish*, this Court announced that it was "far too late in the history of antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable 'per se.'" *Jefferson Parish*, 466 U.S. at 9. This Court explained that a "[p]er se condemnation—condemnation

without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable." *Jefferson Parish*, 460 U.S. at 15, relying on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-51 (1982). This Court recognized the rationale was to avoid the burdensome inquiry into market conditions where the probability of anticompetitive effect is so great as to render unjustified the cost. This Court stated that the "[a]pplication of the per se rule focuses on the probability of anticompetitive consequences." *Jefferson Parish*, 466 U.S. at 15.

Once the evidence raises fact issues on the elements, *per se* condemnation is triggered. Then the case becomes one for the jury. This evidentiary analysis flows from the proper application of the third and fourth elements of a tying claim. Under the third element, a claimant must produce evidence that the seller possesses sufficient economic power or market power in the market for the tying product to enable it to appreciably restrain competition in the market for the tied product. *Jefferson Parish*, 466 U.S. at 14; *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 620 (1977). Similarly, an antitrust claimant must produce sufficient evidence on the fourth element and show that not an insubstantial amount of interstate commerce in the tied product is foreclosed by the tying arrangement. *Jefferson Parish*, 466 U.S. at 16; *Northern Pac. Ry. Co.*, 356 U.S. at 6-7. A claimant thus triggers the *per se* rule by satisfying the elements to show a probability of anticompetitive effects.

The court of appeals, while recognizing the *Jefferson Parish* standard, employed its new economic theory as a means of reversing without considering the flawed premise of the theory or Taylor's evidence. As earlier observed, the

court of appeals merely reasoned that if an ultimate consumer could purchase the tied product from a seller not subject to the tie then, *ipso facto*, no competitive injury could be present. Such an economic theory ignores the reality of the market place that a dealer, such as Taylor, would attempt to pass on the supracompetitive prices to which the dealer is subjected by the coerced tie.

The analysis not only ignores that a dealer is as much a victim[1] subject to an antitrust violation as the ultimate consumer but also ignores (1) the impact on the ultimate consumer when the dealer successfully passes on the supracompetitive prices and (2) the impact on the ultimate consumer when the price charged by a seller not subject to the tie invariably rises closer to the supracompetitive prices of a market leader. Indeed, in rejecting Kodak's theory that competitors would inform customers about Kodak's pricing policy, this Court said: "to inform customers about Kodak, the competitor must be willing to forego the opportunity to reap supracompetitive prices in its own * * * markets." *Eastman Kodak*, 119 L.Ed. 2d at 288, n. 21. The Court should thus reject the new theory of the court of appeals because that theory, like Kodak's, only works if competitors act contrary to their own interest!

The court of appeals had evidence before it that sellers would act in their own interest. Taylor produced evidence that at least raised a jury issue on the elements and anticompetitive effect. Taylor's evidence showed that in

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[1]The opinion of the court of appeals in this case also turns a blind eye to the language of the *Jefferson Parish* majority opinion that the *per se* rule is based in part upon congressional findings that tying contracts are "alike injurious to small dealers." *Jefferson Parish*, 466 U.S. at 10, n.15, quoting 51 CONG. REC. 9090 (1914).

his market[2] Hollymatic was the market leader. Taylor's evidence showed that in his market territory, the Hollymatic Super Patty Machine (the tying product) represented 95% of the sales for machines of that size. Similarly, Hollymatic was the leader in patty paper sales, and maintained substantial sales of its patty paper, despite double-digit supracompetitive price increases in the 1980's when competition stiffened.

Hollymatic conceded, on cross-examination of one of its executives, that the "common tie" between machines, the service, and the paper was the explanation for the success for the Hollymatic program. Indeed, Hollymatic admitted, when asked for an explanation as to how Hollymatic maintained its leadership in patty paper sales despite rising prices, that the Hollymatic dealers were successful "in a majority of the cases" because of the "common tie." Hollymatic succeeded to the point that 96% of the paper sold to dealers was at the supracompetitive prices without rebates. Since Hollymatic sold 96% of its paper at the supracompetitive prices, and since Hollymatic dealers were successful in the majority of the cases in maintaining the Hollymatic Patty Paper sales leadership, it necessarily follows that the probability of anticompetitive consequences existed.

Taylor's evidence not only raised a fact issue on the probability of anticompetitive consequences but also rebutted the underlying assumptions of the economic theory of the court of appeals. Instead of ignoring Taylor's

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[2]The target market was Taylor's territory, consisting of 88 counties in the Western-third of Texas, the six Eastern counties of New Mexico, and all of the Oklahoma panhandle, a market larger than some states.

evidence, the court of appeals should have given that evidence the weight to which it was entitled. As this Court recognized in *Eastman Kodak*, direct evidence, together with reasonable inferences, can raise fact issues on illegal tying. *Eastman Kodak*, 119 L.Ed.2d at 290. This Court noted, in explaining why Kodak was not entitled to summary judgment, it was "clearly reasonable to infer that Kodak had market power" from direct evidence offered and also "plausible * * * to infer that Kodak chose to gain immediate profits by exerting market power" against locked-in customers. *Eastman Kodak*, 119 L.Ed. 2d at 290. The same reasonable inferences triggering *per se* condemnation flow from the evidence that Hollymatic dealers succeeded in a majority of the cases. A proper review of the evidence, not based on assumptions in conflict with profit motives that drive the market, at least raises a fact issue on the probability of anticompetitive effects, thereby applying the *per se* condemnation.

On the other hand, if the economic theory of the court of appeals is accepted, then dealers, such as Taylor, are substantially denied access to the protection of the antitrust laws. If a dealer cannot at least raise the *per se* illegality of tying by evidence of the elements, without the necessity of a full-blown and burdensome analysis of market forces, then a dealer has no real access to the courts. Not only does a market analysis pose a financial barrier, but it requires the dealers to rebut an unsupported economic theory and prove a negative. Under the court of appeals' analysis, a dealer cannot recover without proof that no ultimate consumer can purchase the tied product from another seller not subject to the tie—an almost impossibility! If a dealer is ever to have the protection of the antitrust laws, it makes more sense to permit that dealer to

trigger *per se* condemnation by inferential proof of the probability of anticompetitive consequences: *i.e.*, success in the market place by passing on the supracompetitive prices. Otherwise, most dealers, particularly a small business, will be denied the protection of the antitrust laws.

The court of appeals, however, never focused on the impact on competition which inexorably follows when a dealer is forced by a tie to pay supracompetitive prices. A dealer is as much a consumer deserving protection of the antitrust laws as an ultimate consumer. Therefore, that protection should be afforded a dealer who proves the elements and triggers *per se* condemnation.

CONCLUSION

For the reasons stated, the Supreme Court of the United States should grant the petition for writ of certiorari, reverse the judgment of the court of appeals, and affirm the judgment of the district court and grant Taylor such further relief, including cost of court and attorney's fees, as is just.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1211

ROY B. TAYLOR SALES, INC.

Plaintiff-Appellee,

versus

HOLLYMATIC CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges. HIGGINBOTHAM, Circuit Judge:

Roy B. Taylor Sales, Inc., a dealer of hamburger patty machines and patty paper, sues its supplier, Hollymatic Corporation, a manufacturer of patty products. Taylor alleges that Hollymatic violated the antitrust laws by requiring Taylor to purchase patty paper as a condition to purchasing patty machines. A Texas jury found that Hollymatic illegally tied the products in violation of § 1 of the Sherman Act[1] and § 3 of the Clayton Act[2], that

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[1]15 U.S.C. § 1.

Hollymatic conspired with its paper supplier, Bomarko Corporation, to restrain trade in violation of § 2 of the Sherman Act[3], and that Hollymatic established or attempted to establish a monopoly in violation of § 1 of the Sherman Act[4]. The district court trebled the jury's award and entered judgment for Taylor. We find insufficient evidence of either a threat or injury to competition and reverse.

I.

Roy B. Taylor Sales, Inc., sells and services food handling equipment and supplies. Hollymatic Corporation manufactures food processing equipment and related products, including machines for making hamburger patties and paper for handling hamburger patties. Bomarko Corporation supplies Hollymatic with paper goods to make patty paper.

Taylor began selling Hollymatic products in 1970 subject to an agreement requiring Taylor not to stock or sell the merchandise of Hollymatic's competitors. The parties forged a different agreement in 1979 requiring Taylor to make its "best efforts" to promote, sell, and service the full line of Hollymatic products. Taylor alleges that while the 1979 agreement did not formally prohibit Taylor from selling products other than Hollymatic's, Hollymatic informally maintained the requirement. Taylor claims that Hollymatic required Taylor, and other dealers and distributors, to purchase exclusively Hollymatic patty

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[2]15 U.S.C. § 14.

[3]15 U.S.C. § 2.

[4]15 U.S.C. § 1.

paper as a condition for the purchase of patty machines.

According to Taylor, Hollymatic and Bomarko conspired to resist a decline in patty paper prices. Taylor suggests that Hollymatic could sustain prices above the market rate for patty paper because dealers and consumers were dependent on Hollymatic for supplying and servicing its patty machines. Taylor further alleges that Hollymatic offered rebates on patty paper only to some customers. Taylor sought such rebates, but claims that it received only a slight reduction in price in one instance and that it was refused any reduction in others.[5] After selling no patty paper other than Hollymatic's for years, Taylor began in 1988 to purchase a substitute.

Hollymatic officials confronted Taylor's president, Ronnie Taylor, in 1990 about Taylor's decreased demand for Hollymatic's product. When Mr. Taylor acknowledged purchasing patty paper from another company, Hollymatic expressed an intention to end the relationship with Taylor. Taylor offered to sell only Hollymatic patty paper in the future and Hollymatic responded with a new agreement that would result in probation rather than termination. After the parties failed to come to terms over the amount of patty paper that Taylor would purchase each month, Hollymatic severed relations.

Taylor adduced statements made by Hollymatic executives indicating a policy of requiring dealers to purchase exclusively Hollymatic patty paper as a condition for purchasing other Hollymatic products, and evincing an

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[5]Taylor does not claim that Hollymatic used the tie to effect price discrimination in violation of the Robinson-Patman Act. See 15 U.S.C. § 13, et seq.

intent to make an example of Taylor for failing to abide by that requirement. Hollymatic in turn acknowledges that its dissatisfaction with Taylor stemmed in part from Taylor's decision not to purchase patty paper from Hollymatic beginning in 1988. Indeed, Hollymatic also accuses Taylor of purchasing "counterfeit" Hollymatic spare parts. Nevertheless, Hollymatic claims that its termination in 1990 of its relationship with Taylor was not a response to Taylor selling the products of other companies.

Taylor seeks damages for the loss of profits it suffered in the five years subsequent to Hollymatic's cessation of business relations. Taylor asserted at trial that it could have made profits of approximately $80,000 each year for a present value total of roughly $370,000. Taylor acknowledged that, after a lapse of five years, it could recover from the loss of Hollymatic's product line. The jury found for Taylor and awarded $296,662.60 in damages, trebled as a matter of law to $889,987.80.[6]

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[6]Hollymatic appeals the district court's denial of its motion to dismiss Taylor's complaint, its motion for summary judgment, its motion for judgment as a matter of law, its renewed motion for judgment as a matter of law, and its motion for a new trial. See Fed. R. Civ. P. 12(b)(6), 56, 50(a), 50(b), and 59(a). As a jury ruled on the evidence at trial, we need not consider whether at any given stage Hollymatic might have prevailed. We assess instead the propriety of the jury verdict. See, e.g., Bealmer v. Texaco, Inc., 427 F.2d 885, 886 (9th Cir.), cert. denied, 400 U.S. 926 (1970) (refusing to entertain appeal of denial of summary judgment after final resolution of case). Compare Savarin Corporation v. National Bank of Pakistan, 447 F.2d 727, 732 (2d Cir. 1971) (entertaining challenge of denial of summary judgment after final resolution of case) with Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986) (criticizing Savarin and refusing to entertain appeal of denial of summary judgment).

Hollymatic provides support only for the contention that it may

II.

Hollymatic argues that insufficient evidence supported the jury's finding of a tie. Hollymatic also contends that the evidence did not support the conclusion that Hollymatic threatened, or caused the kind of harm, to competition necessary for an antitrust violation. We do not pause over the question of whether there was a tie because we conclude that, assuming there was one, Taylor failed to prove that it was illegal.[7] We also conclude that the insufficiency of the evidence is fatal to Taylor's alternative theories.

A.

Taylor does not claim that Hollymatic limited the choices available to consumers. Hollymatic required Taylor, a dealer, to provide only Hollymatic patty paper.

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appeal the district court's denial of its Rule 12(b)(6) and summary judgment motions. Hollymatic cites two cases in which we entertained interlocutory appeals of, respectively, denial of a motion for summary judgment and of a motion under Rule 12(b)(6), both requested on the basis of qualified immunity. See Spann v. Rainey, 987 F.2d 1110, 1112 (5th Cir. 1993); Jackson v. Beaumont Police Dept., 958 F.2d 616, 618 (5th Cir. 1992). Qualified immunity provides a rare exception to the general rule that we will not address on appeal a denial of summary judgment. Hollymatic offers no grounds for entertaining appeals of motions denied prior to the jury's verdict in cases that do not involve qualified immunity.

[7]We review the evidence to determine whether a reasonable jury could have found for Taylor. R.D. Imports Ryno Indus. v. Mazda Distrib., 807 F.2d 1222, 1224 (5th Cir.), cert. denied, 484 U.S. 818 (1987). Hollymatic also contends that the district court committed reversible error in instructing the jury. We do not address this issue because we rule for Hollymatic on other grounds.

Customers purchasing patty machines from Taylor remained free to buy paper elsewhere. Only Taylor was bound. As we examine Taylor's complaints about this restriction, we must keep in mind that the antitrust laws protect competition, not competitors.[8] Ultimately, the consumer is the beneficiary.

An illegal tie may be shown by proof that the tying firm "exert[s] sufficient control over the tying market * * * to have a likely anticompetitive effect on the tied market."[9] This is sometimes described as "per se" illegality. This label makes sense when describing price fixing or horizontal market division, but is confusing here because it insists on an inquiry into market power as a predicate to "per se" illegality.

This odd use of the term "per se" is descriptive of a rule located between a per se and a rule of reason inquiry. The best that can be said for it is that it reflects the intermediate danger tying arrangements pose to the market: unlike other "per se" illegal arrangements, "not every refusal to sell two products separately can be said to

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[8]See Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (antitrust laws provide "protection of competition, not competitors."); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n. 21 (1977) (antitrust jurisprudence deals primarily with "market considerations," not with "restrictions on the autonomy of independent businessmen").

[9]Breaux Bros. Farms v. Teche Sugar Co., 21 F.3d 83, 85 (5th Cir. 1994) (citing Jefferson Parish Hops. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-18, 26-29 (1984)).

restrain competition."[10] Rather, there must be proof "as a threshold matter * * * [of] a substantial potential for impact on competition in order to justify per se condemnation" of a tie.[11]

The alleged tying arrangement between Hollymatic and Taylor was a form of vertical nonprice restraint, that is, "an agreement between entities at different levels of distribution that does not purport to affect prices charged for * * * goods."[12] Vertical nonprice restraints are generally not subject to per se analysis.[13] Ties, however, are often instrumental to suspect vertical nonprice restraints. They may enable an entity to circumvent laws proscribing anticompetitive or other behavior. Thus, for example, a

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[10]See Jefferson Parish, 466 U.S. at 11. See also id. at 32-44 (O'Connor, J., concurring) (arguing that per se analysis should not apply to tying arrangements).

[11]Id. at 16.

[12]Smith Machinery Co., Inc. v. Hesston Corp., 878 F.2d 1290, 1295 (10th Cir. 1989), cert. denied, 492 U.S. 1073 (1990) (footnote and citations omitted). See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.") (footnote omitted).

[13]See Business Electronics, 485 U.S. at 735-36 ("[E]conomic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.").

firm may avoid price regulation,[14] may engage in price discrimination,[15] or may undertake predatory pricing through the use of a tie.[16] Taylor does not allege that Hollymatic pursued any of these specific ends. More generally, a firm may leverage power in one market into additional power in another. This leveraging can force existing competitors from the tied market or create barriers to entry.[17] As the tied market weakens, the tying firm's market power may increase.[18]

Tying arrangements that threaten competition come in myriad industries. A seller of machines, for example, may condition the availability of parts on the purchase of repair

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[14]See Jefferson Parish, 466 U.S. at 36 n.4 (O'Connor, J., concurring) ("In a regulated industry a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.") (citations omitted).

[15]See id. ("Tying may * * * help the seller engage in price discrimination by 'metering' the buyer's use of the tying product.") (citations omitted).

[16]See generally E. Thomas Sullivan and Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications 183-85 (2d ed. 1994) (summarizing rationales for proscribing tying arrangements).

[17]See Jefferson Parish, 466 U.S. at 14-15; id. at 36-40 (O'Connor, J., concurring).

[18]See generally Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 Colum. L. Rev. 515, 520-25 (1985).

services,[19] or a hospital may provide care only if patients use particular anesthesiologists.[20] Their common ground is ultimate consumers have to buy one product or service to receive another, removing them from the market for the tied good.

Where, however, only dealers are subject to a tie,[21] competitors do not lose a segment of the tied market if there are genuine alternative paths to consumers. Here, assuming a tie was in place, customers could purchase Hollymatic patty machines from Taylor and purchase patty paper elsewhere. Alternative distributors did not have to be robust to compete; they merely had to exist. Companies entering the patty paper market could attract Taylor's customers provided they charged a lower price, produced a superior product, or both. Ties that constrain only dealers, like the one Taylor complains of, create relatively little danger to competition,[22] provided consumers may purchase the two goods separately.[23]

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[19]See Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992).

[20]See Jefferson Parish, 466 U.S. at 4-5.

[21]Cf. Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969) (consumers and intermediaries in line of distribution required to purchase home to receive loans on favorable terms) and 429 U.S. 610 (1977) (same case).

[22]See Phillip E. Areeda, Antitrust Law, ¶ 1725b, at 316-18 (1991).

[23]Where the only competition for an item occurs at the level of the distributor, a tie at that level may foreclose part of the market to competitors in the tied good. If a company sells canning machinery on

As we have suggested, mechanical inquiry into the fit of per se categories has little utility in exposing any injurious impact upon competition of ties. Inquiry into Hollymatic's power in the tying market tells us nothing of other patty paper distributors. Ronnie Taylor testified, "Patty paper was I guess always available through paper companies if customers called and asked paper companies about it." When asked if paper "was always available to end users in [his] territory," he replied, "Yes." The evidence suggests that competition in patty paper sales was fierce, and that Hollymatic was dependent on Taylor's aggressive efforts to move its product. Under these circumstances, any obligation on Taylor to carry only Hollymatic's patty paper would have enhanced competition by ensuring Hollymatic access to the market. Yet assessing Hollymatic's power in the tying market, and whether there was a not insubstantial amount of commerce in the tied market, would not uncover this fact.

The present situation is analogous to others in which a manufacturer requires a dealer to carry one product in its line to receive another. The Tenth Circuit addressed these circumstances in Smith Machinery Co. v. Hesston Corp.,[24] in which a manufacturer conditioned sale of farm equip-

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condition that a canner also buys cans, the consumers will purchase the two as a single product. Competitors will not be able to sell cans directly to consumers of canned goods. See id. ¶ 1725b, at 317 (providing this example). A similar situation arose in United States v. Loew's, Inc., 371 U.S. 38 (1962). Distributors conditioned purchases by television stations of desirable films on purchases of undesirable films. Consumers received transmission of both.

[24]878 F.2d 1290 (10th Cir. 1989), cert. denied, 493 U.S. 1073 (1990).

ment to a dealer on purchase of its tractors.[25] The court acknowledged that the arrangement constituted a tie but focused on the risk posed to competition rather than on labels.[26] Although free to sell tractors from other manufacturers, the dealer complained that in light of its limited resources purchase of one tractor would foreclose purchase of another. The court responded that this claim "[e]ven if true" would not affect its analysis.[27] The court reasoned:

> [W]here a dealer is serving as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of [an] arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate consumer. Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in a typical line forcing situation such as that at bar.[28]

We find the same to be true of the alleged tie in the

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[25]Id. at 1291-92.

[26]See id. at 1295 (citing Jefferson Parish, 466 U.S. at 21 n.34).

[27]Id. at 1296.

[28]Id. at 1297 (citing Jefferson Parish, 466 U.S. at 5; Loew's Inc., 371 U.S. at 40; Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 3 (1958); International Salt Co. v. United States, 332 U.S. 392, 393 (1947)).

present case. The claimed arrangement between Hollymatic and Taylor constituted a vertical nonprice restraint between a manufacturer and a dealer on goods that the dealer offered to customers independently. It was in effect an exclusive-dealing agreement in which Hollymatic required Taylor to sell Hollymatic, and only Hollymatic, patty paper.[29] Such an arrangement is not the sort "that would always or almost always tend to restrict competition and decrease output."[30] It does not threaten competition to the same extent as tying arrangements that bind ultimate customers. Regardless of whether the restraint also constitutes a tying arrangement, subjecting it to per se analysis would ignore our directive from the Court.[31] The

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[29]See Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 393-94 (7th Cir. 1984) (Posner, J.) (arguing that exclusive-dealing agreements which require dealer to sell only manufacturers product line are assessed under "Rule of Reason") (cited with approval in Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1258 n. 18 (5th Cir.), cert. denied, 488 U.S. 890 (1988)).

[30]Business Electronics, 485 U.S. at 723 (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290 (1985) (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979))) (internal quotation marks omitted).

[31]See id. at 726 ("departure from [the rule-of-reason] standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions") (interpreting Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) and Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)); Jefferson Parish, 466 U.S. at 21 n.34 ("The legality of * * * conduct depends on its competitive consequences, not on whether it can be labeled 'tying.' If the competitive consequences of [an] arrangement are not those to which the per se rule is addressed, then it should not be condemned irrespective of its label.").

measure of legality of relationships between manufacturers and independent distributors must not be allowed to turn on labels. Here the language of per se violations has little utility in the absence of price fixing or horizontal division of markets.

B.

The alleged tie was nevertheless illegal if it "had an actual adverse effect on competition."[32] Taylor's dissatisfaction resulted from competition in the patty paper market. Taylor claims to have lost business because Hollymatic's prices made it difficult for Taylor to compete. Ronnie Taylor, a member of the family that owned and ran Taylor Sales, Inc., complained that because of Hollymatic's high patty paper prices, Taylor "began to lose customers to competition." These signs of a healthy market in patty paper belie Taylor's claim that the tying arrangement harmed patty paper purchasers.

Taylor's claim was, ironically, that it lost customers to competitors; that the consumer's response to the asserted high price of paper was to purchase paper elsewhere. Now, this may have cost Taylor money—injured it—but it belies its claim of injury to competition. Purchasers of machines from Taylor simply found a different seller. Taylor's incentive to accept Hollymatic's requirement that Taylor buy its paper rested on the profitability of its machine sales.

Taylor characterizes as a threat to competition the possibility that patty paper purchasers bought Hollymatic's

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[32]Breaux Brothers, 21 F.3d at 86 (quoting Jefferson Parish, 466 U.S. at 31) (internal quotation marks omitted).

paper at supracompetitive prices. The claim is:

> A customer receiving Hollymatic machines, parts, and service from a Hollymatic dealer may well buy the Hollymatic Patty Paper because of that "common tie" to the dealer. After all, that is more convenient to the customer than seeking an independent source who could sell patty paper at a competitive price.

The Supreme Court rejected such reasoning in Jefferson Parish. The fact that consumers might buy goods because of convenience created by a tie does not suffice as evidence of an unreasonable restraint on competition.[33] Speculation about anticompetitive effects is not enough. Taylor had to show that the tie "as it actually operate[d] in the market"[34] harmed competition. The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices above the market.

III.

This lack of evidence also defeats Taylor's claim of conspiracy under § 1 of the Sherman Act.[35] Taylor claims that Hollymatic conspired with Bomarko to restrain trade. The elements of a § 1 claim are: "1) joint or concerted action between more than one party that 2) unreasonably

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[33]Id. at 29-30.

[34]Id. at 29.

[35]15 U.S.C. § 1.

restrains trade in 3) interstate or foreign commerce."[36]

Taylor's claim of conspiracy is derivative of its tying claim. Taylor contended in its closing argument:

> Hollymatic was being pressured to buy more paper than it could sell. Hollymatic in turn was putting pressure on its dealers. Why? Because Bomarko and Hollymatic together could not compete in a free market—not and both of them take double digit profits they were taking.

Taylor implicated Bomarko in the alleged tying arrangement. This accusation is consistent with the request for damages resulting from termination, which followed from enforcement of the claimed tie. The conspiracy claim fails because the underlying tie was not illegal—the concert of action did not unreasonably restrain trade.

To establish an unreasonable restraint of trade, Taylor's proof must have included evidence from which the jury could have found that Hollymatic's actions had a "substantially adverse" impact on competition.[37] Assessing such an impact requires an inquiry into the conditions of the relevant market.[38] As we explained, Taylor provided

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[36]R.D. Imports Ryno Indus. v. Mazda Distrib., 807 F.2d 1222, 1224 (5th Cir.), cert. denied, 484 U.S. 818 (1987). Hollymatic argues that it and Bomarko were not distinct entities and that the two therefore could not have conspired. We need not address this issue because Taylor's § 2 claim fails in any case.

[37]Id.

[38]Id. ("Market considerations provide the objective benchmark for the measurement of competitive impact.") (citing Continental T.V.,

no basis for concluding that Hollymatic's actions affected competition adversely.

Taylor also contends that Hollymatic amassed monopoly power in the patty machine market in violation of § 2 of the Sherman Act. Market power is the ability to control prices or exclude competition.[39] An assessment of market power requires a definition of the relevant market.[40] This definition requires two limiting terms: "characterization of the product itself and characterization of the relevant geographic market in which that product is sold."[41] Hollymatic complains that Taylor has never defined the market in which Hollymatic wields power. We agree.

Taylor argues that its sales area drew the geographical lines for the market in which Hollymatic possessed power. We find that Taylor failed to offer evidence to support a jury finding that Hollymatic possessed the requisite power in the market for any particular product in Taylor's sales area. We assume without deciding that the sales area was the appropriate geographical area for measuring competi-

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Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54 (1977); Daniels v. All Steel Equipment, Inc., 590 F.2d 111, 113 (5th Cir. 1979)).

[39]See Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979).

[40]See Seidenstein v. National Medical Enterprises, Inc., 769 F.2d 1100, 1106 (5th Cir. 1985) ("Before a defendant's market power can be determined, the relevant market must be defined.").

[41]R.D. Imports, 807 F.2d at 1224-25.

tion.[42]

Taylor's claim of monopoly tracks its allegation of a tying arrangement. Taylor describes the "Hollymatic Patty Machine" as the tying product, suggesting that Hollymatic amassed power in the market for this machine and its competitors. However, Hollymatic contends, and the record confirms, that the "Hollymatic Patty Machine" does not exist. Taylor's arguments on appeal and the record indicate that Taylor may have intended to refer to either of two possible product markets: the market for the Super Patty Machine, a particularly successful Hollymatic product; or the market for all Hollymatic patty machines.[43] Taylor failed to prove that Hollymatic possessed monopoly power in either market, or that the Super Patty Machine and comparable machines were sufficiently insulated from competition to constitute a distinct market.

We could assume that Taylor meant the tying market

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[42]See id. at 1225 ("the geographic dimensions of [a] market encompass[] the areas of effective competition in which the particular product or its reasonably interchangeable substitutes are traded") (quoting Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1393 (5th Cir. 1983)) (internal quotation marks omitted).

[43]Taylor relies on the pretrial order and the jury instructions as identifying the "Hollymatic Patty Machine." The pretrial order, however, describes "Hollymatic hamburger patty machines as a tying product and Hollymatic patty paper as a tied product." The district court's instruction to the jury similarly explains, "Taylor has alleged that Hollymatic established a tying arrangement whereby Hollymatic sold Taylor hamburger patty machines (the tying product) conditioned on Taylor purchasing Hollymatic patty paper (the tied product)." These sources indicate that the jury addressed Hollymatic's power in the market for patty machines in general, not in the market for the Super Patty Machine.

to include Hollymatic's Super Patty Machine and comparable machines sold by other manufacturers. Taylor at times adopts this approach, noting that all parties to the litigation acknowledge the prominent place in the market of the Super Patty Machine. This testimony sometimes suggested that the Super Patty Machine was a "lead product," "flagship product," "market leader," "dominant," and "premiere product." Beyond these general descriptions of market success, however, Taylor provides little basis for a conclusion that Hollymatic possessed monopoly power in the market consisting of the Super Patty Machine and its competitors. Taylor does not specify the percentage of sales attributable to the Super Patty Machine in any market[44] or provide any basis for even a rough estimate of such a figure, nor does Taylor recount information useful in assessing the strength and scope of competition in the market for the Super Patty Machine.[45]

Significantly, there was inadequate evidence about other products available to Hollymatic's customers. Hollymatic faced competition, for example, from manufacturers of machines that produced patties on a larger scale than the Super Patty Machine. In the mid-1980s, Wendy's, at the time a faithful customer of Hollymatic, abandoned the Super Patty Machine for larger machines sold by a rival of Hollymatic, which Wendy's stationed in central locations. This event indicates that larger machines provided a viable alternative to the Super Patty Machine,

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[44]See, e.g., Jefferson Parish, 466 U.S. at 26-28 (identifying percentage of particular market garnered by tying product); Breaux Bros., 21 F.3d at 86-88 (same).

[45]See Jefferson Parish, 466 U.S. at 26-28.

at least in a substantial segment of the market. It also increased the supply of used Super Patty Machines, which decreased sales in new machines.

Ronnie Taylor acknowledged selling used Super Patty Machines at a profit equal to or greater than the profits available from selling new machines, both before and after Hollymatic terminated his dealership. These competitive threats to the Super Patty Machine are at odds with a claim of market power—a concept that is not interchangeable with market success. Despite these disquieting features of the market, Taylor provided no evidence of the size and strength of the market in used machines or the incidence of customers changing to larger machines. This illustrates the absence of focus upon market power. Without such basic information about the market, the jury had no means to assess the market power the Super Patty Machine conferred on Hollymatic.

Taylor may have meant the term "Hollymatic Patty Machine" to refer, instead, to all of Hollymatic's patty machines. Thus, Roy B. Taylor, a member of the family that owns Taylor, was asked, "And you are saying that the continuation of being able to sell the Super Machine is what forced you to sell paper at a higher price at that amount of profit?" He responded, "No, sir. I am saying the failure to sell all their patty machines." The jury did not, however, have a sufficient basis for concluding that Hollymatic possessed monopoly power in the market for all patty machines.

Taylor relies on only two statements that Roy B. Taylor made about Hollymatic's presence in the patty machine market. First, Mr. Taylor provided "just an estimate" that in 1979 of the 200 to 300 patty machines in

his territory, no more than five were manufactured by Hollymatic's competitors. This statement casts little light on Hollymatic's power in the patty machine market at relevant times. Second, Mr. Taylor responded to the question, "What percentage or share of the patty machine market to the customers that you were serving, customer base that you were serving, did you have as a Hollymatic distributor?" Mr. Taylor answered, "Conservatively I think I could honestly say 95 percent of the business." While Mr. Taylor acknowledged that there were machines competitive with Hollymatic's products, he claimed that they did not "perform efficiently" and that "some" of them were no longer on the market. Mr. Taylor did not define his "patty machine market" such as the range of patty machines that the market included. Testimony indicated that Hollymatic was "the industry leader" in certain lines of patty machines but, as we explained, did not suggest the share of the market Hollymatic controlled or the nature of the competition Hollymatic faced. The evidence indicates that customers could purchase used machines or replace several small patty machines with a single large one sold by a competitor of Hollymatic.

Importantly, there was no evidence of significant barriers to entry. In the absence of barriers to entry such as a capital intensive industry or patents, a competitor waiting on the sidelines can deny those in the market the power to control prices—because current players cannot exclude competition.

In short, Taylor offered no direct evidence that Hollymatic could control prices in the market for patty machines or for any particular machine, and offered no evidence of Hollymatic's share in either market. As a result, "[t]here was simply no evidence from which the

jury could begin to measure [Hollymatic's] power to control prices or to exclude competition in [any] relevant market."[46] Taylor offers no reason to believe that Hollymatic acquired or maintained,[47] or threatened to acquire or maintain,[48] a monopoly. Taylor cannot succeed under § 2 of the Sherman Act.

Finally, Taylor claims that Hollymatic's actions violated the Texas Free Enterprise and Antitrust Act.[49] The parties agree that Texas antitrust law mirrors federal law as applied to the present case.[50] State law does not

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[46]Spectrofuge Corp., 575 F.2d at 286.

[47]Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 (5th Cir. 1984) ("[T]he offense of monopoly under § 2 [of the Sherman Act] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.") (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)) (internal quotation marks omitted).

[48]See id. at 490 ("The offense of attempted monopolization has two elements: (1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt to monopolize the relevant market will be successful.") (quoting Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 525 (5th Cir. 1982), cert. denied, 103 S.Ct. 1770 (1983); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979)) (internal quotation marks omitted). See Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884, 892 (1993) (requiring proof of dangerous probability of monopoly for attempt claim under § 2 of Sherman Act).

[49]Tex. Bus. & Comm. Code Ann. § 15.05(a)-(c).

[50]See Caller-Times Pub. Co. v. Triad Communications, Inc., 826 S.W.2d 576, 580 (Tex. 1992).

offer an alternative grounds for affirmance.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROY B. TAYLOR SALES, INC.,	§	
Plaintiff,	§	
v.	§	
	§	
HOLLYMATIC CORPORATION,	§	Civil Action No.
Defendant.	§	5:91-CV-042-C

JUDGMENT ON JURY VERDICT

On February 4, 1993, the parties appeared and announced ready for trail. A jury was duly impaneled and sworn and heard the evidence and argument of counsel. In response to questions, definitions and instructions submitted to them by the Court, they made findings which were received by the Court and were filed and entered of record on the minutes of the Court. The Plaintiff moved for a judgment on the verdict. The Court duly heard and considered the motion and is of the opinion that judgment should be rendered for the Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff, ROY B. TAYLOR SALES, INC., do have and recover of the Defendant, HOLLYMATIC CORPORATION, the sum of $296,662.60, which amount is trebled as a matter of law to $889,987.80, together with attorney's fees and expenses in the amount of $85,718.21.

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that Plaintiff recover all costs of court in this behalf expended and that this judgment bear interest from date of judgment until paid at the rate of 3.45 percent per annum.

SIGNED this 25th day of February, 1993.

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROY B. TAYLOR SALES, INC.,	§	
Plaintiff	§	
v.	§	
	§	
HOLLYMATIC CORPORATION,	§	Civil Action No.
Defendant.	§	5:91-CV-042-C

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case. [R. 4:891]

* * *

QUESTION NO. 1

Do you find that:

(1) Hollymatic established a tying arrangement?
Answer: "Yes" or "No."
Answer: Yes

(2) Hollymatic violated Section 3 of the Clayton Act?
Answer: "Yes" or "No."
Answer: Yes

(3) Hollymatic violated Section 1 of the Sherman Act?
Answer: "Yes" or "No."
Answer: Yes [R. 4:920]

MOTION FILED
DEC 1 1994

No. 94-810

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY B. TAYLOR SALES, INC.,
Petitioner,
v.
HOLLYMATIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INDEPENDENT DISTRIBUTORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-810

ROY B. TAYLOR SALES, INC.,
Petitioner,

v.

HOLLYMATIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Your amicus respectfully requests leave to file the attached brief on behalf of the Independent Distributors Association in support of the Petition for Certiorari of Roy B. Taylor Sales, Inc. Petitioner has consented to the filing of this brief. A copy of Petitioner's letter of consent has been filed with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

The Independent Distributors Association ("IDA") requests that this Court consider its brief in this matter as a representative of over 400 independent manufacturers, sellers or wholesale distributors of construction equipment replacement parts.

Your amicus is familiar with the questions involved and the scope of their presentation and believes additional

argument is necessary on the issue of whether the United States Court of Appeals for the Fifth Circuit created an improper exception to the "per se" rule of illegality established by this Court in antitrust tying cases, thereby removing any practical remedy that dealers subjected to tie-ins could obtain under federal antitrust laws. The attached brief presents additional authorities and arguments to assist this Court in reviewing the issues contained in the Petition for Certiorari.

Because of the important issues of federal antitrust law presented in this case and the need for this Court to reaffirm the per se rule of illegality in antitrust tying cases, your amicus respectfully requests that this Court grant the Motion for Leave to File the attached Brief *Amicus Curiae*.

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BRIEF AMICUS CURIAE OF THE INDEPENDENT DISTRIBUTORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Independent Distributors Association submits this Brief *Amicus Curiae* in support of the Petition for Certiorari filed by Roy B. Taylor Sales, Inc.

INTERESTS OF THE AMICUS

The Independent Distributors Association ("IDA") requests that this Court consider its brief in this matter as a representative of over 400 independent manufacturers, sellers or wholesale distributors of construction equipment replacement parts.

In the manufacture of bulldozers and other heavy earth-moving and construction equipment, ever-increasing numbers of components are not actually manufactured by the machine manufacturers, but are purchased from outside suppliers. Members of the IDA are independent manufacturers, suppliers, and sellers of these types of machine components. The component parts generally are sold to and through heavy equipment manufacturers and IDA members.

Caterpillar Inc. occupies a dominant market position in the multi-billion dollar construction equipment industry, both in the number of new machines sold and total sales dollars. With respect to dealers of Caterpillar equipment, your amicus submits, Caterpillar ties the sale of its heavy equipment to sales of component parts that are used in the equipment. The IDA and its members, consequently, have a keen interest in decisions made by federal courts relating to tying arrangements.

The IDA believes that the decision of the Fifth Circuit Court of Appeals in *Roy B. Taylor Sales, Inc. v. Hollymatic Corporation,* 28 F.3d 1379 (5th Cir. 1994) could result in an application of the antitrust laws that would significantly narrow the protection that members of the IDA now enjoy from anticompetitive conduct in which major manufacturers are, or may in the future be, engaged.

Your amicus appreciates the opportunity to present these views, and respectfully requests that this Court grant the Petition for Certiorari.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals incorrectly applied a Rule of Reason standard in the *Hollymatic* case, instead of the applicable per se rule of illegality set forth by this Court in previous tying cases. As a result, the court of appeals required proof that Respondent's tying arrangement with Petitioner dealer had anticompetitive

effects upon down-market consumers. This requirement clearly is at odds with the proper rule enunciated by this Court.

Further, the decision of the Fifth Circuit Court of Appeals fails to provide dealers with the same protections under the federal antitrust laws that are afforded to end-users, despite the fact that protection of dealers was one of the purposes for enacting the specific antitrust laws that are at issue in this case.

The result of the court of appeals' decision is a dramatic narrowing of the commercial circumstances to which the federal antitrust laws will apply. Under this decision, elimination of competition for sale of the tied product and resultant supercompetitive prices to the dealer are not competitive injury. Absent proof of competitive injury to end-users, dealers injured by illegal tying arrangements have no recourse under the antitrust laws. The Fifth Circuit Court of Appeals' requirement that dealers subject to tying arrangements meet an unreasonable burden of proving anticompetitive effect upon end-users will have a chilling effect upon private enforcement of the antitrust laws.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ADOPTING A RULE OF REASON STANDARD IN LIEU OF A PER SE RULE OF ILLEGALITY WITH RESPECT TO DEALERS

A. Definition of a Tying Arrangement

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that the party will not purchase that product from any other supplier. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). Tying arrangements "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way" and "serve hardly any purpose beyond the suppression of competition." *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969); *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949). Therefore, tying arrangements are per se unlawful. *Northern Pac.*, 356 U.S. at 3.

B. Standard of Proof

Under the prevailing standard, which was reaffirmed in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), and recently in *Eastman Kodak Co. v. Technical Services, Inc.*, 504 U.S. ——, 119 L.Ed.2d 265 (1992),[1] a plaintiff seeking relief under the antitrust statutes, including the Sherman Act and the Clayton Act, as a result of a tying arrangement must prove that (1) the seller conditioned sale of its tying product on the buyer's purchase of the tied product; (2) the tying and tied products are separate and distinct products; (3) the seller possesses sufficient economic power in the market

[1] It was noted in *Kodak* that, despite arguments to the contrary, the Court has not altered significantly the per se tying doctrine over the years. *Kodak*, 119 L.Ed.2d at 296-97 (Scalia, J. dissenting).

for the tying product to appreciably restrain competition in the tied product; and (4) a not insubstantial amount of commerce in the tied product is foreclosed by the tying. *See, e.g., Jefferson Parish*, 466 U.S. at 9, 12-18.

This Court's precedents specifically state that, because of the difficulty of demonstrating an anticompetitive effect in a tied-product market resulting from a tying arrangement, and because such an effect is presumed to occur as a result of such arrangements when the seller has economic power in the tying market, actual proof of anticompetitive effect is not necessary. *Id.* at 9-10, 15-16. Instead, the law presumes an anticompetitive effect upon proof that the seller's economic power in the tying market enables it to restrain competition in the tied product. *Id.*[2] This presumption of illegality is known as the per se rule.

The only significant difference when applying the per se standard in an antitrust tying case as opposed to a non-tying case is that the defendant is permitted to offer business justifications for undertaking the tie. *See, e.g., Betaseed, Inc. v. U. & I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982).

C. The Fifth Circuit Failed to Apply Correctly the Applicable Standard

Despite the clarity of the precedents to which it was bound, the Fifth Circuit Court of Appeals in *Hollymatic* instead was guided by a minority concurring opinion from *Jefferson Parish*. *See* Petitioner Taylor's Appendix 1 ("Appendix") at 6-7.[3] The concurring opinion in *Jefferson*

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[2] *But see NCAA v. Board of Regents*, 468 U.S. 85, 104 n.26 (1984) (certain tying arrangements may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis).

[3] The court of appeals did not address the sufficiency of the evidence presented in the lower court that demonstrated a tie between the Hollymatic machinery and the patty paper. The court of appeals instead assumed that a tie existed, but reversed the jury

Parish advocated the abolition of the per se rule of illegality in tying cases in favor of the Rule of Reason. *Jefferson Parish*, 466 U.S. at 35. The Rule of Reason requires a court to determine whether the actual anticompetitive effect upon the market for the tied product outweighs any pro-competitive effects. *Id.* This standard was rejected by the majority in *Jefferson Parish*, which reaffirmed the per se rule for tying arrangements. *Id.* at 9-10, 15-16.[4]

The court of appeals' reliance on the concurring opinion in *Jefferson Parish* eviscerates the presumption afforded to plaintiffs in per se tying cases, and places an unreasonable burden of proving anticompetitive effect upon the dealer plaintiff that conflicts with the legislative objectives of these statutes and previous case requirements.

Most disturbing, however, is that the Fifth Circuit Court of Appeals not only required proof of anticompetitive effect in *Hollymatic*, but also expected the dealer plaintiff to prove competitive injury to the "ultimate con-

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verdict in favor of Taylor because the court found that Taylor failed to prove that the tie was illegal, *i.e.*, that it had an anticompetitive effect upon consumers. *See* Appendix at 5.

[4] A minority of the circuit courts of appeal have required the plaintiff to show an anticompetitive effect in the market for the tied product. *Compare Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982) *with Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987) (noting that requirement of potential market power in tied product has not been endorsed by Supreme Court); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986) (proof of anticompetitive effect only required where tying arrangement not shown to be illegal per se). This conflict in the standard being applied to a federal statute by a significant minority of the courts of appeal further compels clarification of the standard by this Court.

sumer." The court stated that the per se rule should not be applied where the anticompetitive effect of the tie was at the dealer level as long as end-users were able to obtain a product equivalent to the tied product from other sellers who were not subject to the tying arrangement. Appendix at 9-10. The court failed to consider, however, the practical economic effects of imperfect competition at the dealer level.[5]

For example, the court failed to consider that the increase in prices of the dealer's tied products resulting from the tying arrangement might permit other competitors to raise their prices to an artificially high level as a result of the lack of vigorous competition from the dealer.[6] The possibility of this result was acknowledged previously by this Court in response to a similar argument made by a defendant manufacturer. *See Kodak*, 119 L.Ed.2d at 288 n.21.

The court also failed to consider certain externalities that impact an end-user's decision to purchase the tied product from the dealer. Despite the availability of lower prices from competitors, dealers in Taylor's position are foreclosed from offering the tied product at a lower cost because of the tying arrangement. As a result, end-users

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[5] Under this standard a tied dealer might never recover under the antitrust laws. Injury to the dealer generally will occur if the dealer could otherwise have purchased the equivalent of the tied product from another seller at a lower price. But if the lower-priced product would otherwise be available to the dealer subject to the tie, it should also be available through other channels to the end-user. The *Hollymatic* court has stated that a dealer can only succeed in its action when the tying arrangement totally forecloses the ability of a consumer to obtain the product at a non-tied price.

[6] Moreover, where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, further impeding competition on the merits. *Jefferson Parish*, 466 U.S. at 15 n.24.

who desire consistency, continuity or convenience through the use of one dealer to obtain equipment, related supplies, and repair services, are forced to absorb the higher costs for the tied product that are passed-on by the dealer. *See, e.g., Kodak*, 119 L.Ed.2d at 288-89.

Economic reality and the logic of the precedents and arguments above strongly suggest that anticompetitive transactions occurring at any level of the chain of distribution have a ripple effect throughout the remainder of the market. Therefore, it is almost inevitable that, for example, Hollymatic's supercompetitive prices for the tied product affected the ultimate consumers of the tied product by enabling other sellers to raise their prices.

The *Hollymatic* case is a perfect example of the type of arrangement that is disfavored under the antitrust laws —an arrangement in which the seller forces, through exploitation of its leverage in the tying market, the purchase of its tied product in order to extend its influence into the tied market through other than competitive means. *See Jefferson Parish*, 466 U.S. at 36 (O'Connor, J. concurring). Application of the per se rule of illegality is entirely appropriate in such cases, and the Fifth Circuit Court of Appeals' failure to apply the per se rule clearly is erroneous.

II. THE COURT OF APPEALS ERRED BECAUSE THE PRACTICAL EFFECT OF ITS DECISION IS THAT THE FEDERAL ANTITRUST LAWS WILL PROTECT ONLY END-USERS AGAINST TIE-INS

The court of appeals stated that "(t)ies that constrain only dealers, like the one Taylor complains of, create relatively little danger to competition, provided consumers may purchase the goods separately. Appendix at 9 (footnotes omitted). Because the court reasoned that a restraint on a dealer does not threaten competition to the same extent as those that bind ultimate consumers, the

court failed to consider the injurious impact of the tie upon Taylor and other Hollymatic dealers.[7] The court's unduly narrow view of competitive injury is in direct conflict with four decades of private antitrust enforcement in which dealers and franchisees have successfully obtained antitrust remedies where tie-ins resulted in overcharges through the elimination of competition for the tied product.

The Supreme Court has stated:

> The antitrust laws "[do] not confine [their] protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The [laws are] comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (referring to the Sherman Act). The Supreme Court has stated further that the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1977).

Previous decisions of this Court and lower courts indicate that dealers are protected with the same vigor as end-users under the antitrust laws. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (vertically imposed price restraint operating upon a single dealer could cause injury, and the dealer could recover for lost profits). Such a

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[7] A significant fallacy entertained by the court of appeals is that a clear distinction can always be made between a "dealer" and an "ultimate consumer" under the antitrust laws. This Court need look no further than its most recent tying case to witness the complexity of present-day relationships between manufacturers, dealers and consumers, which in many cases demonstrate that a dealer actually is a consumer in certain situations. *See, e.g., Kodak*, 119 L.Ed.2d 265 (entity was dealer for service but consumer for parts).

rationale is consistent with the Supreme Court's pronouncements that proof of public injury, *i.e.*, injury to a broad spectrum of end-users, is not required for a private plaintiff to successfully assert a per se violation of the antitrust laws. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1961).

Even more instructive on this issue is the legislative history of the antitrust laws. For example, the House Report on the Clayton Act stated:

> When we consider contracts of sales made under this system [a tying arrangement], the result to the consumer, the general public, *and the local dealer and his business* are even worse than under the lease system.

HR Rep. No. 627, 63d Cong., 2d Sess., 12-13 (1914) (emphasis added). Similarly, Representative Mitchell stated:

> No situation cries more urgently for relief than does this situation, and this bill seeks to prevent exclusive "tying" contracts that have brought about a monopoly, *alike injurious to the small dealers,* to the manufacturers, and grossly unfair to those who seek to enter the field of competition and to the millions of consumers.

51 Cong. Rec. 9090 (1914) (emphasis added).

These authorities indicate that the Fifth Circuit Court of Appeals was incorrect when it focused solely on the impact of a tying arrangement on the "ultimate consumer," without consideration of the injury to the dealer itself. Dealers have the right to seek remedies under the antitrust laws to the same extent as end-users, and to have the standards previously enunciated by this Court applied to their cases.

CONCLUSION

For the foregoing reasons, your amicus respectfully urges this Court to grant the Petition for Certiorari and ultimately to reverse the decision below.

Respectfully submitted,

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Should this Court issue a writ of certiorari to reconsider the Court of Appeals' decision that it is not a *per se* violation of the antitrust laws to replace a poorly performing exclusive dealer who for two years had excluded the manufacturer from selling patty paper in its territory?

RULE 29.1 LIST

Respondent Hollymatic Corporation has no parent corporations or non-wholly owned subsidiaries.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Hollymatic Corporation ("Hollymatic"), respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Court of Appeals' unanimous opinion in this case. That opinion is reported at 28 F.3d 1379 (5th Cir. 1994) (Higginbotham, J.).

STATEMENT OF THE CASE

A. Disposition In Courts Below

Petitioner Roy B. Taylor Sales, Inc.'s ("Taylor") Statement of the Case incorrectly and incompletely describes the disposition of the proceedings in the Court of Appeals. The unanimous opinion reversing the judgment of the district court carefully and thoroughly examined the entire record for facts demonstrating anticompetitive conduct and found none. Taylor instead quarrels with the Court of Appeals' determination that, even if Taylor could have demonstrated that Hollymatic terminated Taylor for not using its best efforts to sell both Hollymatic patty machines and paper, which Taylor characterized as a "tie", Hollymatic's action was procompetitive, because it increased consumer choice by ensuring that Hollymatic patty paper would be available to consumers. Pet. Apx. at 10. This Court, however, has no need to address the Questions Presented by Taylor's Petition because the court found that there was no evidence in the record of any injury to competition or to Taylor caused by a violation of the antitrust laws.

The Court of Appeals found no evidentiary basis in the record for Taylor's antitrust claims, including its tying claim. For example, Taylor did not submit any evidence defining the market in which Hollymatic supposedly wielded power. *Id.* at 16. Indeed, the record confirmed that the "Hollymatic Patty Machine" that Taylor alleged at trial to be the tying product for which Hollymatic possessed market power "does not exist." *Id.* at 17. Nor did Taylor introduce any evidence demonstrating the "strength and scope of competition" for those

Hollymatic machines that did exist. *Id.* at 18. The Court of Appeals found no guidance as to the geographic market or the product market at issue from the evidence Taylor offered at trial. The Court of Appeals also noted "[i]mportantly, there was no evidence of significant barriers to entry." *Id.* at 20. In sum, the Court of Appeals found that "Taylor offered no direct evidence that Hollymatic could control prices in the market for patty machines or for any particular machine, and offered no evidence of Hollymatic's share in either market." *Id.* at 20.

The Court of Appeals also found no evidence of "an actual adverse effect on competition." *Id.* at 13. Taylor's allegations of supracompetitive prices were found to be no more than "speculation," disproved by Taylor's own evidence. *Id.* at 14. Consequently, the Questions Presented as framed by Taylor's Petition assume facts not supported by the record in this case and are merely designed to obscure Taylor's purpose of asking this Court to review the record to determine whether the Court of Appeals properly reversed on the basis of Taylor's numerous evidentiary failings.

Given the paucity of Taylor's evidence at trial, the Court of Appeals was able to pass over a number of otherwise dispositive grounds for reversal without the necessity of ruling on them. Thus, the Court of Appeals had no need even to address such issues as whether Hollymatic ceased doing business with Taylor because Taylor was selling the products of other companies, whether a tying arrangement even existed (given the lack of coercion and distinct products), and whether the district court committed reversible error in instructing the

jury. Pet. Apx. at 4-5. Although the Court of Appeals initially assumed a theoretical "tie," upon closer analysis, the Court of Appeals found that, at best, the record might establish something similar to "an exclusive-dealing agreement" rather than a tying agreement. *Id.* at 12.

The *only* issue presented by this case is whether it is a *per se* violation of the antitrust laws to terminate a poorly performing exclusive dealer who for two years had excluded Hollymatic from selling patty paper in its territory. All of the Courts of Appeals that have looked at the issue have uniformly answered no.

B. Statement Of The Facts

The record more than confirms the Court of Appeals' conclusions regarding the absence of facts demonstrating an antitrust violation in this case. Although currently positioned as a tying claim, Taylor never alleged anything more than the typical "jilted distributor" case which has been repeatedly rejected by federal courts as a basis for antitrust liability. Hollymatic's decision to replace Taylor with a more aggressive distributor was manifestly pro-competitive.

Taylor was Hollymatic's exclusive distributor in the sense that Taylor provided Hollymatic's only access to the market in Taylor's sales territory. Taylor did not carry Hollymatic's products exclusively, although it agreed to use its "best efforts" on behalf of Hollymatic. Pet. Apx. at 2. Best efforts were required if Hollymatic was to compete effectively.

Although Hollymatic offered well-engineered products, Hollymatic was hardly a dominant supplier of food processing equipment, patty machines or patty paper. Hobart is the dominant competitor in the sale of food processing equipment in the United States and often described as the "giant" of the industry. The other major competitors include Formax, Patty-O-Matic, NuTEC, Bridge and Koppens. Hollymatic's market position had been steadily eroding over the years. For many years fast food outlets had been major customers for Hollymatic, with three key accounts being McDonalds, Burger King and Wendy's. All three of these customers were lost to Formax. The loss of Wendy's alone "flood[ed] the market" with used machines, which, as the record shows, were a major competitive factor. During the relevant time period, Wendy's placement of nearly 3,500 used Hollymatic machines on the market caused Hollymatic's sales of new machines to drop by over 500 units per year.

The uncontradicted evidence in the record showed that the market for patty paper was "extremely competitive". Hollymatic's main competitors in the sale of patty paper were Formax, Framarx, James River and Schwab. The patty paper for Hollymatic machines is interchangeable, and customers can indiscriminately switch to preferred brands.

Patty paper users who regularly use a high volume of paper buy in large bulk amounts based primarily on price. Such bulk sales were usually at low prices, with Hollymatic and its dealers receiving low margins. To compete for this business, Hollymatic had a national competitive allowance program in which Taylor refused

to participate because at times Taylor's margin could be as low as 4% when it insisted upon at least a 25% margin.

Small customers, buying one or a few boxes of patty paper at a time, purchased patty paper primarily on nonprice factors, including ease of delivery, convenience and service. These customers tend to buy from dealers that offer, as part of patty paper sales, either free service on equipment (or at least service at reduced labor rates), quicker delivery, better service or the ability to inventory the paper for smaller accounts until needed.

Despite Hollymatic's need for aggressive marketing of the patty machines and paper, Taylor failed to use its best efforts to sell Hollymatic products. Taylor was terminated, as the record showed, because it was a poor dealer. Taylor sold few Hollymatic machines. Its sales of machines were continuing to drop, even after repeated warnings. In a rapidly changing market and with deteriorating sales, Taylor only maintained one outside sales person for an exclusive territory of 150,000 square miles. Taylor had decided to build its business solely around its servicemen and concentrate on small accounts and Taylor had abandoned all efforts to sell to processing and packing plants, meat packers, and central commissaries. It is no wonder that Taylor was a low-volume dealer with downward trending sales. Indeed, although the Petition now identifies the Hollymatic Super Patty Machine as the tying product, Taylor's sales of such machines were *de minimus*. Taylor sold only 12 Super Patty Machines over the last five years of its distributorship, an average of just 2.4 machines per year. (The total profit to Taylor was less than $3,000 per year from these sales.)

Taylor was a problem dealer in many other respects. Its credit was bad, and Hollymatic consequently had to repeatedly deal with past due accounts. It refused to cooperate with Hollymatic's national sales program, failing, for example, to install equipment purchased by a U.S. Air Force base in its exclusive territory. It even went so far as to lie to the government, saying it had not been paid by Hollymatic to install the equipment when it had. Taylor also performed erratically in other respects, such as purchasing counterfeit parts for resale as part of its service operation.

The Court of Appeals correctly recognized that Taylor continuously misstated and confused statistical facts and statements. Although Taylor in its Petition now claims that in its territory the Super Patty Machine "represented 95% of the sales for machines of that size," the Court of Appeals observed that "Taylor does not specify the percentage of sales attributable to the Super Patty Machine in any market or provide any basis for even a rough estimate of such a figure, nor does Taylor recount information useful in assessing the strength and scope of competition for the Super Patty Machine." *Cf.* Pet. at 15 and Pet. Apx. at 18 (footnotes omitted).[1]

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[1] As the Court of Appeals noted, contrary to what Taylor says in its Petition, all that Taylor's evidence showed was that Taylor had 95% of the patty machine business of its existing customers. *Id.* at 20. This, as the Court of Appeals observed, shed no light on what percentage of sales in the patty machine market was attributable to the Hollymatic Super Machine or any other Hollymatic machine. *Id.* at 18.

With respect to the sale of Hollymatic patty paper, Taylor's conduct was even more anticompetitive. Although Hollymatic had been forced to increase prices due to rising raw material costs, many customers continued to purchase Hollymatic patty paper because of, among other factors, Hollymatic's superior services and prior relationships, speed of delivery, and savings on labor costs. Taylor, however, refused to participate in Hollymatic's competitive rebate program and refused to cut margins at all to retain customers. (As Taylor admits, however, rebates were only necessary in 4% of sales, indicating most Hollymatic customers' recognition of the added value provided by Hollymatic's services.) In September of 1988, almost two years before Taylor was terminated, Taylor secretly ended its purchases of Hollymatic patty paper.

Instead of buying Hollymatic patty paper, Taylor secretly became the distributor of Formax's Shur Quality patty paper. Pet. at 7. Thus, Hollymatic's exclusive dealer intentionally excluded Hollymatic entirely from the patty paper market in its 150,000 square mile territory and instead became the distributor for Formax – the same major competitor that had pushed Hollymatic patty machines out of McDonalds, Burger King, and Wendy's. The record in this case thus overwhelmingly demonstrates – and, as it must, the Petition effectively admits – that Taylor breached its "best efforts" agreement with Hollymatic. Pet. at 7.

The record shows that Hollymatic increased competition in patty paper when it terminated Taylor. Taylor

continued selling its other lines of products, new Hollymatic machines purchased from other dealers, used Hollymatic machines, and the same Shur Quality Formax paper it had been selling exclusively for almost two years before it was terminated. Thus, the replacement of Taylor merely added a new Hollymatic dealer to the territory, permitting Hollymatic patty paper once again to be sold, and did not eliminate any competitor.

Taylor's new theory of antitrust injury apparently is that Hollymatic's insistence that Taylor aggressively sell all of Hollymatic's products allowed Hollymatic to obtain a supracompetitive price for patty paper. The Court of Appeals found the record wholly lacking of any evidence of actual supracompetitive prices. The sole "evidence" for this claim was isolated testimony that Taylor knew of one customer who paid an $11.10 higher price for a case of patty paper or less than one-twentieth of one cent per sheet more for the same quantity of paper as another customer. This evidence says nothing regarding supracompetitive pricing, which the Court of Appeals found nonexistent. This pricing was based on Taylor's insistence on getting a 25% margin on its patty paper sales rather than participate in Hollymatic's competitive allowance program where appropriate. Moreover, the record was silent on whether the supposed customer paid the 1/20 of a cent higher price in return for free service, or to defray the cost of the dealer in carrying the inventory and giving prompt delivery of the small order at the customer's convenience.

Taylor freely admitted, as the record showed, that competition for patty paper sales was "fierce" and Hollymatic offered rebates on its patty paper to retain customers in the face of this stiff competitive pressure. Pet.

Apx. at 10. Taylor itself believed that Hollymatic always would provide competitive rebates if they were necessary to retain customers. Nevertheless, Taylor refused to participate in the competitive allowance program because Taylor felt that rebates reduced its own profit margin. It was Taylor's rejection of Hollymatic's competitive rebates, not its termination, that was anticompetitive.

The record does not support Taylor's claim of a meaningful tie, as the Court of Appeals clearly noted. Taylor's eventual focus on only one Hollymatic patty machine as the alleged tying product, the Super, demonstrates the lack of substance to its claim. Taylor claims that Hollymatic used the leverage of losing $3,000 to $6,000 per year in profit[2] to tie patty paper sales. Such dollar amounts are frivolous and not even *de minimus* for tying purposes. There could be no better proof of why there was a complete lack of market power than the fact that Taylor, beginning two years before its termination, stopped buying Hollymatic patty paper, refused to buy it at the time of termination, and continued to buy Formax paper after its termination. In short, the record shows there was never a tie.

Based on Taylor's poor performance as a Hollymatic dealer, Hollymatic severed relations and replaced Taylor with a new dealer. Hollymatic's new dealer did participate in Hollymatic's competitive allowance program and competed with Taylor and Formax. Taylor's only complaint is not that its potential customers were unable to

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[2] During the five years before its termination, Taylor's average profit, on sales of 2.4 Supers per year, was $3,000 and its highest profit for any of the years was $6,000.

buy whatever brand of patty paper or food processing equipment they chose at competitive prices, but rather that Taylor lost money because it could no longer keep Hollymatic from competing with it in the sale of Formax patty paper. Taylor continued to compete and then filed suit to recover alleged lost profits resulting from its termination. Pet. Apx. at 4.

REASONS FOR DENYING THE WRIT

This case presents no record for reconsidering the requisites for *per se* illegality articulated by this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). None of the three "Questions Presented" by the Petition satisfy this Courts' criteria for granting a Writ of Certiorari, nor do they even demonstrate an error on the part of the Court of Appeals. Taylor's argument – that the Court of Appeals should have focused on the injury done to the terminated dealer – improperly diverts the analysis away from consumers and competitive injury toward Taylor's alleged injury from termination. This analysis would leave no meaningful way of differentiating between *per se* illegal tying arrangements and procompetitive exclusive dealer arrangements. Indeed, Taylor's suggested standard would completely undermine the presumed legality of a host of vertical nonprice restraints currently assessed under the rule of reason. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54, 57-58 (1977).

Given that none of Taylor's three "Questions Presented" are supported by the facts of this case or the law,

and no conflict in the federal appellate courts is indicated, the Petition should be denied.

I. PETITIONER'S TYING CLAIM WAS NOT SUPPORTED BY FACTS IN THE RECORD

Contrary to its Petition, Taylor lost below for want of evidence, not because the Court of Appeals decided to divest dealers of potential antitrust remedies. Critical elements necessary to establish an unlawful tying arrangement simply lacked any factual support in the record.[3] The Court of Appeals' decision was confined to the facts of this case.

This Court has held that *per se* condemnation of an alleged tying arrangement "is only appropriate if the existence of forcing is probable." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15 (1984). Thus, a tying arrangement is only *per se* unlawful where, at a minimum: (1) the seller conditions the sale of the tying product on the purchase of the tied product; (2) two distinct products are involved; (3) the seller has market power in the tying product; and (4) the arrangement affects a substantial amount of interstate commerce in the tied product market. *Id.* at 9, 12-18. In addition, a plaintiff must demonstrate both anticompetitive injury and that the injury flowed from the anticompetitive act in order to recover treble damages for an alleged violation.

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[3] This was not surprising given the number of different and sometimes conflicting theories of liability that Taylor presented as the case progressed. *See, e.g.*, Pet. Apx. at 17 n.43.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

Taylor's initial "Question Presented" contains at least three unsupported assumptions: (1) that a tying arrangement was imposed on Taylor; (2) who was terminated for refusing to purchase a tied product; (3) at supracompetitive prices. In actuality, the Court of Appeals did not find that Taylor proved either a tying arrangement or the basis for its termination. Moreover, the Court of Appeals specifically held that Taylor did not establish supracompetitive pricing.

Obviously, Taylor could not prove a tying case without establishing market power in a tying product. Yet, the Court of Appeals found that Taylor introduced no evidence at all of Hollymatic's alleged market power. Indeed, the Court of Appeals could not even identify a tying product. The Court of Appeals also found no substantial potential for impact on competition. Absent such proof, in this case, the Petition's Questions Presented need not and cannot be reached. Simply put, they have not yet been posed. In essence, the Petition seeks an advisory opinion unsuitable for a writ of certiorari. *See SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("Resolution here . . . can await a day when the issue is posed less abstractly.").

In an attempt to demonstrate antitrust injury, the Petition raises the spectre of supracompetitive pricing. Pet. at 8, 12, 15. Contrary to the Petition's implications, the Court of Appeals found no evidence of "supracompetitive prices" for Hollymatic patty paper. Pet. Apx. at

14 ("The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices above the market."). Although some pricing differentials existed in various paper markets, the Court of Appeals recognized that Hollymatic cut prices to meet or beat its competition. Taylor even acknowledged that Hollymatic had offered competitive allowances which Taylor rejected. In addition, several nonprice factors were important to consumers' perception of value, including convenience, reduced inventory levels, free service and timely deliveries. Absent accounting for these value added factors, cost comparisons would prove nothing.

In sum, the Court of Appeals found that the factual assertions that are repeated in Taylor's Petition were unsubstantiated in the record. What Taylor really wants is for this Court to sift the record to determine whether there was any factual foundation for a *per se* tying claim. It is not, however, the task of this Court to perform a factual review of a record already perused by the appellate court. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

A. There Was No Evidence Of Sufficient Market Power In The Market For The Tying Product To Appreciably Restrain Competition In The Tied Product

The record readily rebuts Taylor's complaint that the Court of Appeals ignored the evidence of tying in this case. Although this Court held in *Jefferson Parish* that

market power in the tying product is a prerequisite for *per se* tying liability, the Court of Appeals found the record barren of evidence of market power of any sort. Taylor failed to introduce evidence defining the relevant geographic or product markets at all. Not only was there no evidence of market power, Taylor failed to even identify a tying *product*. Consequently, the record in this case will not support the theoretical baggage that Taylor continues to append to it. *See, e.g., Breaux Brothers Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83 (5th Cir.), *cert. denied*, 130 L.Ed. 2d 339 (1994).

The lack of evidence concerning the relevant product market was compounded by Taylor's failure to identify a tying product. Prior to trial, Taylor betrayed the theoretical deficiency for its tying claim by confusing its Hollymatic *franchise* with a tying product. Taylor's attempt at trial to "redefine" the tying product as the "Hollymatic Patty machine" was found to be equally spurious. As the Court of Appeals recognized, no such machine even existed. Pet. Apx. at 17.

In its Petition, Taylor belatedly identifies only one of Hollymatic's patty machines, the Super Patty Machine, as the tied product. Taylor's current decision to call the Super a tying product, however, does not establish market power for that product. As noted above, Taylor's sales averaged only 2.4 Super Patty Machines a year in its 150,000 square mile territory. There was no evidence that the Super was dominant in any market, *especially Taylor's*. On the contrary, competitors such as Formax had introduced sophisticated, high-volume machines that captured an increasing share of the market as fast food franchises

centralized processing operations. Moreover, the evidence indicated that, as the equipment market moved away from smaller machines like the Super, used Supers flooded the market, undercutting Hollymatic's ability to sell new machines.

Nor was there anything unique to Hollymatic machines that would serve to tie consumers to purchasing Hollymatic patty paper. *Cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2087 (1992) (acknowledging theoretical potential for market power where consumers are "locked into" a single product line). Patty machines and patty paper are interchangeable. Thus, even those consumers who purchased a Hollymatic Super Machine would not be "locked into" Hollymatic patty paper.[4] In fact Taylor's real complaint is that Hollymatic's new dealer was cutting margins on patty paper sales to take customers away from using Formax patty paper sold by Taylor and to get them to use Hollymatic paper. This is the essence of price competition, not tying.

Absent evidence of market power in a tying product, this case is revealed for what it always was: a typical

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[4] Although Taylor also failed to identify the relevant geographic market, the Court of Appeals assumed, for the sake of argument, that Taylor's distribution territory was the relevant market area. This assumption did not satisfy Taylor's burden of proof at trial, however. Moreover, without reference to the overlapping markets for Hollymatic's competitors, this assumption can be questioned. In addition, Taylor introduced no evidence regarding customer differentiation within the assumed market. Consequently, Taylor failed to satisfy a threshold requirement for establishing market power.

situation involving a distributor terminated for poor performance. Taylor's ever-mutating tying allegations had no basis in fact or law and no other distributor is affected by the outcome of Taylor's case.

B. No Substantial Amount Of Commerce In The Allegedly Tied Product Was Foreclosed

In *Jefferson Parish*, this Court recognized that a "substantial potential for impact on competition" must exist in order to justify *per se* condemnation. 466 U.S. at 16 ("If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law."). Here, no customers were forced. *Cf.* Pet. at 14, 16. As previously noted, the Court of Appeals found that Taylor could not demonstrate that commerce was foreclosed in the allegedly tied product because the complained of conduct actually *increased* availability of patty paper to customers. As long as Taylor sold Hollymatic patty paper, customers had the option of purchasing Hollymatic patty paper or that sold by any of its competitors. Pet. Apx. at 6 ("Customers purchasing patty machines from Taylor remained free to buy paper elsewhere.").

Hollymatic was a relatively minor player in the patty machine and paper markets and was dependent on Taylor, as the only distributor in its territory, to ensure Hollymatic's access to the ultimate consumer. Ironically, Taylor's continued refusal to stock and sell Hollymatic patty paper effectively eliminated *Hollymatic's* access to the patty paper market and limited consumer choice.

Including Hollymatic, there were at least five competing patty paper suppliers in Taylor's territory. The record established that "competition in patty paper sales was fierce, and that Hollymatic was dependent on Taylor's aggressive efforts to move its product." Pet. Apx. at 10. The Court of Appeals therefore was compelled to conclude that "[u]nder these circumstances, any obligation on Taylor to carry only Hollymatic's patty paper would have enhanced competition by ensuring Hollymatic access to the market." *Id.*

Taylor, however, balked at carrying Hollymatic patty paper, preferring to stock the major competitor's brand. Hollymatic offered competitive allowances in an effort to encourage Taylor to meet its competition, but Taylor held out for larger, across-the-board price breaks. This was to increase Taylor's margins, not competition. In sum, the only foreclosure of commerce in the allegedly tied product occurred when Taylor blocked *Hollymatic's* access to the patty paper market for two years by substituting the product of a competitor. On the other hand, Taylor's own evidence demonstrated that the patty papers of Hollymatic's competitors were "always available" to end users in Taylor's territory. Pet. Apx. at 10. Accordingly, Hollymatic's alleged conduct could not have foreclosed any commerce at all in any brand of patty paper and impacted only one dealer, by increasing competition.

C. The Record Adduced No Evidence Of Antitrust Injury

Taylor implicitly assumes that it can recover if it proves a *"per se"* tying arrangement even if it fails to

establish antitrust injury. Taylor's alleged injury was not based on the existence of the alleged tying arrangements arising out of its 1970 and 1979 agreements with Hollymatic, however, but out of its own termination as a Hollymatic distributor.[5] Had Taylor agreed to aggressively distribute Hollymatic patty paper with the rebates and lower prices, the arrangement would have increased competition rather than restrained it by maintaining Hollymatic as a competitor in the market. In at least three separate cases, this Court has found no viable antitrust claim because the plaintiff's injury resulted from heightened competition rather than a restraint on competition. *Brunswick*, 429 U.S. at 488-89; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-17 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 346 (1990).

Taylor attempts to identify anticompetitive injury by theorizing that customers were forced to pay supracompetitive prices for Hollymatic patty paper. Pet. at 14-17. The Court of Appeals easily saw through Taylor's allegation of supracompetitive pricing as nothing more than "speculation." Pet. Apx. at 14 (citing *Jefferson Parish*, 466 U.S. at 29-30). "Supracompetitive pricing entails a restriction in output." *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2593 (1993); *see also Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (antitrust injury only results from reduced output

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[5] Since Taylor could still buy new Hollymatic equipment from other dealers and used Hollymatic equipment, as well as Formax patty paper, its real complaint is merely that, by being terminated, its margins were cut because it then faced competition from the new Hollymatic dealer.

or increased consumer prices). Taylor can point to no such restraints in the patty paper markets except Taylor's own decision to limit access to Hollymatic's paper.

There simply was no evidence of Hollymatic's ability to "force" patty paper on consumers. Although, like any manufacturer, Hollymatic had the ability to raise its own prices, the record demonstrated that competitors successfully undercut Hollymatic's price increases with those customers unconcerned with Hollymatic's superior services, such as available inventory and delivery times. As a result, Hollymatic soon reduced its own prices through competitive rebates in specific competitive situations. Throughout the relevant period, customers "always had a choice" of patty paper suppliers.

Taylor's supposition that other competitors would increase prices to follow Hollymatic's higher price is fanciful and lacks any basis in the record.[6] Competition was "fierce" with multiple competitors who were *already* undercutting Hollymatic's prices. Pet. Apx. at 10. As a result, Hollymatic lost some customers to competition.

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[6] Taylor speculates that Hollymatic's competitors would not inform consumers of their lower prices, citing *Eastman Kodak*. Pet. at 14. Taylor takes *Eastman Kodak's* concern over pricing information regarding "locked in" aftermarket sales out of context by applying it to the patty paper market, where no consumer is locked into a particular brand. *Cf.* 112 S. Ct. at 2086 n.21; *Lee v. Life Ins. Co. of North America*, 23 F.3d 14 (1st Cir.), *cert. denied*, 130 L.Ed.2d 340 (1994) (tying claim based on lock-in theory dismissed). In Hollymatic's case, a competitor need only advertise its own, lower, patty paper price in order to fully inform consumers of their existing options.

No evidence was introduced to indicate that these competitors would not undercut each other as readily as they would Hollymatic. The evidence establishing Hollymatic's need for competitive allowances also demonstrated that any competitor's sustained effort to increase prices would simply price that competitor out of the market. In fact, if what Taylor theorized could be true, Taylor would still be unable to show an antitrust injury. Taylor continued to sell Formax patty paper after its termination and if Hollymatic sought supracompetitive prices after Taylor's termination, Taylor could merely undercut Hollymatic and keep all the customers. Thus, the termination of Taylor could not restrain competition.

As recognized by the Court of Appeals, Hollymatic's actions were taken to increase competition in the market for patty paper. Pet. Apx. at 10. Taylor's complaint simply echoes that of any other distributor who is replaced in an effort to obtain a more aggressive competitor. *See, e.g., R.W. Intern. Corp. v. Welch Food, Inc.*, 13 F.3d 478 (1st Cir. 1994) (termination of dealer found procompetitive); *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994). The Court of Appeals examined the factual and legal underpinnings of Taylor's claim of competitive injury and found them nonexistent.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Rule 10.1(a) of this Court lists, as the first "special and important" reason for granting a writ, the rendering of ". . . a decision in conflict with the decision of another United States court of appeals on the same matter." Taylor does not contend that any federal appellate court has

rendered a decision conflicting with the one at bar. The Fifth Circuit itself gave no indication whatsoever that its ruling conflicted with that of any other circuit. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923) (where circuits "were really in harmony, and not in conflict," then "there was no ground for our allowing the writ of certiorari to add to an already burdened docket"). Moreover, to the extent that Taylor poses a theoretical question not presented by this record there is no occasion to decide it. *See State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari).

In particular, the Court of Appeals noted that Taylor's allegations were analogous to those the Tenth Circuit addressed and rejected in *Smith Machinery Co., Inc. v. Hesston Corp.*, 878 F.2d 1290 (10th Cir.), *cert. denied*, 493 U.S. 1073 (1990). *Smith Machinery* also dealt with allegations that a manufacturer conditioned sale of certain equipment to its distributor on its purchase of other equipment. Both courts recognized that these allegations did not establish an illegal tie because the "line forcing" did not foreclose choice to the ultimate consumer. Indeed, both courts recognized that the allegations were more closely analogous to "exclusive dealing agreements," which do not invoke *per se* liability. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393-94 (7th Cir. 1984) (exclusive dealing agreements requiring dealer to sell only manufacturer's product line assessed under rule of reason analysis). One need look no further than to

Taylor to see that substitute goods, such as Formax patty paper, were always available.

Federal appellate courts repeatedly are faced with terminated distributors who raise defective antitrust claims in an effort to obtain treble damages. *See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 807-08 (6th Cir. 1988) (rejecting claim which implicitly suggested adopting a *per se* test of illegality for situation in which manufacturer "jilts" its distributors in favor of new exclusive distributor); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 524 (8th Cir. 1987) (affirming summary judgment for defendant on tying claim, holding "[t]here is no illegal concert of action if Sherman simply substituted Premier for Famous in an attempt to find a more active distributor of Sherman's products"); *Unijax, Inc. v. Champion Intern., Inc.*, 683 F.2d 678, 685 (2d Cir. 1982) (judgment n.o.v. affirmed where evidence merely established manufacturer was dissatisfied with dealer's performance and "threatened to cease supplying the company unless sales were increased").

Similarly, in this case, Taylor's actual complaint was that Hollymatic replaced it as a distributor of Hollymatic products because it did not aggressively distribute Hollymatic patty paper. As noted by the Tenth Circuit in *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1381 (10th Cir. 1988), "[t]he substitution of one distributor for another is not manifestly anticompetitive." The Tenth Circuit rejected the alleged tying claim after finding that "[t]he record contains no evidence that the dealer replacement would reduce competition in either manufacturing or sales." *Id.* The Ninth Circuit also has agreed in this context that, where a supplier seeks no more than an

aggressive distributor for his product, his conduct may be more beneficial than detrimental to competition and does not constitute an antitrust violation. *See, e.g., Dreibus v. Wilson,* 529 F.2d 170 (9th Cir. 1975).

Although several courts of appeal have addressed tying cases brought by dealers in recent years, none of these decisions have diverged with that of the case at bar. The majority of these cases have ended in summary judgment for the defendant manufacturer on various grounds. *See, e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.,* 959 F.2d 468 (3d Cir.), *cert. denied,* 113 S. Ct. 196 (1992) (defendant lacked requisite power in the tying product market to be subject to *per se* tying liability); *Suburban Propane v. Proctor Gas, Inc.,* 953 F.2d 780, 788-89 (2d Cir. 1992) (dealer failed to prove manufacturer had the market power necessary to render alleged tie illegal); *Amerinet Inc. v. Xerox Corp.,* 972 F.2d 1483, 1500-01 (8th Cir.), *cert. denied,* 113 S. Ct. 1048 (1993) (dealer failed to prove explicit conditioning necessary for tying arrangement). Consequently, there is no need for this Court to intervene by granting the requested writ.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S ANALYSIS OF ALLEGED TYING CLAIMS

Nor did the Court of Appeals' analysis deviate from the settled principles employed by this Court for the resolution of antitrust cases. Contrary to Taylor's advocacy of a blanket extension of *per se* liability, this Court has recognized that only "certain" tying arrangements are subject to *per se* liability. *Jefferson Parish,* 466 U.S. at 11

("not every refusal to sell two products separately can be said to restrain competition").

As demonstrated above, Taylor did not satisfy the elements of a *per se* tying case as set forth by *Jefferson Parish*. Nor did the Court of Appeals depart from the oft-repeated injunctions of this Court to examine justifications for departing from the rule of reason standard. As explained in *Jefferson Parish* (466 U.S. at 21 n.34):

> "[T]he legality of . . . conduct depends on its competitive consequences, not on whether it can be labeled 'tying.' If the competitive consequences of [an] arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label."

Taylor's blanket approach to *per se* liability would overturn this established precedent with regard to vertical non-price restraints.

In addition, Taylor's proposed theory that Hollymatic can violate the antitrust laws without causing an injury to competition has been rejected by this Court. *See Brook Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). Taylor's failure to grasp this requirement is apparent from the second and third "Questions Presented" by the Petition. The second question asks "[w]hether a dealer subjected to a tying arrangement must show a substantial competitive effect upon the downstream consumer market in order to obtain relief under the antitrust laws?" This question was answered in *Jefferson Parish*, which held (466 U.S. at 16):

> "Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law."

Therefore, absent a "substantial competitive effect" in the market where patty paper was sold, Taylor cannot establish a *per se* tying claim. Pet. Apx. at 14 ("The Supreme Court rejected [Taylor's] reasoning in *Jefferson Parish.*"). Indeed, absent such evidence, Taylor's termination cannot rise to the level of an antitrust injury. As Taylor admitted at oral argument in the Court of Appeals, there was no injury to its customers and its entire claim rests on the premise that any injury to Taylor is injury to competition. One need only look to this Court's recent decision in *Brook Group* to recognize that this is not the law. *Brook Group*, 113 S. Ct. at 2588-89.

The third of the "Questions Presented" similarly implies that the Court of Appeals incorrectly interpreted *Jefferson Parish* by focusing on the impact of the alleged tying agreement on "ultimate consumers" for Hollymatic patty paper. Yet, this analysis was consistent with *Jefferson Parish* in every respect and especially with regard to the effect on ultimate consumers. *Jefferson Parish* examined a challenge brought by an anesthesiologist against a hospital contract requiring all anesthesiological services at the hospital to be performed by a particular firm. Rather than focus on the harm to the anesthesiologist, the Court focused on the impact on *consumers*. 466 U.S. at 18 ("any inquiry into the validity of a tying arrangement

must focus on the market or markets in which the products are sold" and in which the forcing must have an impact). The Court concluded that the analysis must focus on the hospital's sale of services to *patients* rather than the hospital's arrangements with the *providers* of the services. *Id.* Reaching a conclusion entirely consistent with that reached by the Court of Appeals in this case, the *Jefferson Parish* Court found "this record contains no evidence that the hospital 'forced' any such services on unwilling patients." *Id.* at 28; *cf.* Pet. Apx. at 14 ("The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices above market.").

Indeed, this Court has guarded carefully against allowing *per se* condemnation to attach as a matter of labeling. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) ("not all concerted refusals to deal should be afforded *per se* treatment"); *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99-101 (1984) (*per se* treatment of restrictions inappropriate despite obvious horizontal restraints on output where restraint was necessary to product availability); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (licensing restrictions necessary to make market). The Court of Appeals simply examined the arrangement established by the record to determine whether the alleged tie-in was likely to threaten anticompetitive harm and found no such potential.

Finally, Taylor incorrectly portrays the Court of Appeals as "ignoring" Taylor's evidence in order to apply

the rule of reason in a departure from *Eastman Kodak*. The Court of Appeals not only weighed Taylor's evidence fully, but did so under both a *per se* and a rule of reason analysis. The plaintiffs in *Eastman Kodak*, however, had waived their rule of reason tying claim below, leaving "only a *per se* claim before this Court." 112 S. Ct. at 2094 (Scalia, J., dissenting). Nothing in *Eastman Kodak* purports to overturn *Jefferson Parish's* dichotomy between *per se* and rule of reason tying claims and nothing in the record indicates that Taylor's evidence was ignored. To the contrary, after a thorough review of the record, the Court of Appeals concluded that Taylor's evidence contradicted Taylor's own theory of recovery.

CONCLUSION

For all of the reasons stated above, issuance of a writ of certiorari under such circumstances would be improvident. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Furness, Withy & Co. v. Yang-Tsze Insur. Assoc.*, 242 U.S. 430 (1917). The Petition for Writ of Certiorari should be denied.

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